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No. [illegible] 70

# In the Supreme Court of the United States

OCTOBER TERM, 1956

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DAVID B. GOODMAN AND THERESA L. GOODMAN, Estate of HERBERT S. GOODMAN, Deceased, GLADYS C. GOODMAN, EXECUTRIX, AND GLADYS C. GOODMAN, Surviving Wife; HARRY MABEL, Surviving Husband, and ESTATE OF FLORENCE MABEL, Deceased, HARRY MABEL, EXECUTOR, PETITIONERS

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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[illegible],
*Solicitor General,*

[illegible],
*Assistant Attorney General,*

[illegible],
[illegible],

*Department of Justice,*
[illegible], D.C.

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 1426

DAVID B. GOODMAN and THERESA L. GOODMAN; Estate of HERBERT S. GOODMAN, Deceased, GLADYS C. GOODMAN, Executrix, and GLADYS C. GOODMAN, Surviving Wife; HARRY MABEL, Surviving Husband, and ESTATE OF FLORENCE MABEL, Deceased, HARRY MABEL, Executor, PETITIONERS

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners, as law partners,[1] specialized in the practice of real estate law. Since the mid-1930's, they participated in various real estate ventures sponsored

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[1] David Goodman, Herbert Goodman (here represented by his estate), and Harry Mabel comprised the partnership. We refer to them as "petitioners". The other petitioners are wives who joined in the pertinent tax returns.

by clients of the firm. Petitioners', personal involvement in selling and management was limited. However, they participated in the important decisions and gave their consent and approval to the sponsors' activities. Their coventurers valued petitioners' business judgment and experience in the buying and selling of real estate and some would not buy an interest unless petitioners joined. (Pet. 43-46, 50, 51, 56.)

By 1950, the petitioners' real estate holdings were extensive. The fair market value always exceeded $397,000 (Pet. 51-52). The partnership kept a separate bank account, a "real estate" account, into which it deposited proceeds from the sale of real estate interests. These proceeds were used for purchasing new real estate properties (Pet. 50).

There was a constant turnover, but at any given time during the period 1950-1958, petitioners owned interests in between 35 and 57 different realty partnerships, between 4 and 11 realty corporations, and between 6 and 21 realty mortgages. In the aggregate they had at least 61, and as many as 82, such interests (Pet. 51). Petitioners' ownership in each venture varied from 2 to 50 percent, but usually ranged between 15 and 25 percent (Pet. 46).

Each year during this period the petitioners participated in at least 23, and as many as 52, purchases and sales of real estate interests (Pet. 52). The annual average exceeded 36 transactions.[2] (See tabula-

[2] The lower figures given by the dissenting judges (Pet. 19, 33, 35, 38-39) include only properties that were held for more than six months and sold for a gain during the taxable years 1953, 1954 and 1955.

tion at Pet. 52.) Petitioners often held their realty for only short periods of time. For example, of the 32 different realty interests sold during the years 1953-1955 (the years at issue in this suit), 15 had been held less than six months, and 8 less than two years. Only 5 had been held as long as 5 years. (See tabulation at Pet. 47-49.)

During the seven-year period 1950-1956, petitioners' profits from the purchase and sale of real estate averaged $48,261.33 per year. Net income from this source never fell below $26,500 in any year. During this period the partnership received 37.7 percent of its net income from profits on purchases and sales of real estate, 35.0 percent from rents, salaries, and interest on mortgages, and 27.3 percent from the practice of law (see Pet. 53).

Petitioners reported as capital gains the profits from the sales of all real estate owned for more than six months. The Commissioner of Internal Revenue determined that petitioners held the properties primarily for sale to customers in the ordinary course of their trade or business, and that the profits were taxable as ordinary income (see Pet. 53). The deficiencies were paid. In a resulting refund suit, the Court of Claims, in a 4 to 2 decision, upheld the Commissioner's position.[3]

This case presents mainly questions of fact to which the court below applied correct legal principles. There is no conflict or other basis for review by this Court.

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[3] Petitioners' assertion (Pet. 11) that the Court of Claims decision was "three to two" is incorrect. Six judges participated, of whom two filed dissents. (Pet. 23, 32-42.)

1. The question whether a taxpayer holds property primarily for sale to customers in the ordinary course of his trade or business is to be decided upon a consideration of all the relevant circumstances of the particular case. *Bauschard* v. *United States*, 279 F. 2d 115 (C.A. 6); *Gamble* v. *Commissioner*, 242 F. 2d 586 (C.A. 5); *Austin* v. *Commissioner*, 263 F. 2d 460 (C.A. 9); *Crosswhite* v. *United States*, 177 Ct. Cl. 671, 369 F. 2d 989; *Gault* v. *Commissioner*, 332 F. 2d 94 (C.A. 2). Accordingly, the court below based its determination upon the magnitude of petitioners' realty holdings, their extensive, frequent and continuous sales, the frequent short holding periods, the large amounts of money involved in the transactions, the segregation of the proceeds of sales for purchase of other real estate interests, and the profits derived from such ownership and sales as compared to the partners' income from the practice of law. (Pet. 27-28.)

The court did not ignore petitioners' testimony that they were motivated primarily by an interest in rental income. It concluded, however, that the testimony was uncorroborated by other co-owners and contrary to the weight of the evidence. (Pet. 55-56.) Nor did the Court of Claims ignore petitioners' lack of management activity. One may be wholly passive and yet be engaged in the conduct of business through active partners and other agents such as was the case here. *Freeland* v. *Commissioner*, 21 A.F.T.R. 2d 903 (C.A. 9, decided March 8, 1968); *Tibbals* v. *United States*, 176 Ct. Cl. 196, 208, 362 F. 2d 266, 272; *Bauschard* v. *Commissioner*, *supra*, 279 F. 2d at 118; *Achong* v. *Commissioner*, 246 F. 2d 445, 447 (C.A. 9).

2. Petitioners must treat their gains as ordinary income if they held the properties "*primarily* for sale to customers in the ordinary course of [their] * * * trade or business * * *."[4] (Emphasis supplied.) In *Malat* v. *Riddell*, 383 U.S. 569 (1966), this Court ruled that "primarily" means "of first importance" or "principally," and not "substantially." The Court of Claims made explicit its adherence to this standard (Pet. 25, 27-28).

Petitioners assert (Pet. 13-15, 22), however, that under *Malat* property is not held "primarily for sale" in a business so long as the holder has some other primary income producing activity. There was no such issue and no such ruling in *Malat*. Similar arguments have been uniformly rejected, *Gamble* v. *Commissioner*, *supra*; *Frankenstein* v. *Commissioner*, 272 F. 2d 135 (C.A. 7), certiorari denied, 362 U.S. 918; *Achong* v. *Commissioner*, 246 F. 2d 445 (C.A. 9); *Nadalin* v. *United States*, 176 Ct. Cl. 1032, 1044, 364 F. 2d 431, 438-439; *Crosswhite* v. *United States*, *supra*, and the contention is no more persuasive here. A taxpayer would otherwise receive capital gains treatment on profits from sales in any business not singled out as his primary activity.

3. There is no conflict with (Pet. 12) *Austin* v. *Commissioner*, 263 F. 2d 460 (C.A. 9), or (Pet. 16, 21-22) *Municipal Bond Corp.* v. *Commissioner*, 341 F. 2d 683 (C.A. 8). Each case reflects the application of the same legal standard to different records. Although some facts in *Austin* are like some in this

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[4] 1939 Code Section 117(a)(1)(A) and 1954 Code Section 1221(1).

case, the situation as a whole is not. In *Austin*, a lawyer bought a number of unimproved lots in his community over a period of years without any consistent pattern of conduct and under circumstances which persuaded the court that they were random investments. He did not make the frequent and recurring purchases and sales of real estate, or consistently have income from sales, year after year, as petitioners did.

*Municipal Bond Corp.* does not hold, as petitioners urge, that the trial court must invariably make a specific finding about the taxpayer's purpose in holding each property sold. There will, of course, be cases where one person holds some real property for investment and other parcels for sale to customers. And in *Municipal Bonds* the court of appeals was convinced that the Tax Court's decision with respect to some of the property sold might have been predicated upon an erroneous interpretation of the word "primarily". This was the circumstance that resulted in a holding that "purpose or intention must be determined with respect to each tract and such purpose may vary with respect to the different tracts". (341 F. 2d at 689-690).

Here the Court of Claims recognized that individual properties may be held for different purposes.[5] It identified each property and considered all relevant factors (some of which it enumerated) with regard to each. It merely held that where the circumstances of each have been considered and the number of properties and sales is great and frequent, separate find-

[5] And see also *Tibbals* v. *United States*, 176 Ct. Cl. 196, 362 F. 2d 266.

ings as to the specific factors applicable to each are not needed.

Furthermore, as the court below noted, petitioners did not request such detailed findings (Pet. 30-31). The requested findings 16 and 63 in which petitioners claim to have described such details (Pet. 21), in fact set forth no detail not actually included in the court's own findings 19 and 28 (Pet. 47, 52-53).[6]

The petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

MITCHELL ROGOVIN,
*Assistant Attorney General.*

PHILIP R. MILLER,
KNOX BEMIS,
*Attorneys.*

JUNE 1968.

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[6] Petitioners' motion for leave to present further evidence after the Court of Claims remand to the Trial Commissioner to consider the case in the light of this Court's *Malat* decision (see Pet. 21-22) did not state what additional evidence was available to show that a particular property or properties were not held for the same purpose as the others. Even now petitioners describe no such evidence.

Copies of this motion and of petitioners' requested findings are on file with the Clerk of the Court.

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